

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

OSCAR FERNANDEZ,) Case No. CV 09-7222 JCG

Plaintiff,

V.

MICHAEL J. ASTRUE,
COMMISSIONER OF SOCIAL
SECURITY ADMINISTRATION,

Defendant.

Case No. CV 09-7222 JCG

MEMORANDUM OPINION AND ORDER

I.

INTRODUCTION AND SUMMARY

On October 16, 2009, plaintiff Oscar Fernandez (“Plaintiff”) filed a complaint against defendant Michael J. Astrue (“Defendant” or “Commissioner”), the Commissioner of the Social Security Administration, seeking review of a denial of supplemental security income and disability insurance benefits. [Docket No. 3.]

On April 20, 2010, Defendant filed his answer, along with a certified copy of the administrative record. [Docket Nos. 12, 13.]

On April 20, 2010, this matter was transferred to the calendar of the undersigned Magistrate Judge. [Docket No. 14.] Both Plaintiff and Defendant subsequently consented to proceed for all purposes before the Magistrate Judge pursuant to 28 U.S.C. § 636(c). [Docket Nos. 16, 19.]

1 Pursuant to an October 23, 2009 case management order, the parties submitted
 2 a detailed, 17-page joint stipulation for decision on June 24, 2010. [Docket No. 18.]
 3 The Court deems the matter suitable for adjudication without oral argument.

4 In sum, having carefully studied, *inter alia*, the parties' joint stipulation, the
 5 administrative record, *and the prior decisions* of the ALJ and this Court, the Court
 6 concludes that, as described below, Plaintiff's claim is foreclosed by the
 7 administrative *res judicata* doctrine. Plaintiff fails to provide any evidence of
 8 changed circumstances to rebut a continuing presumption of nondisability, which
 9 was established only two years ago by this very Court and must be afforded
 10 preclusive effect. Thus, the Court affirms the Commissioner's decision denying
 11 benefits.

12 **II.**

13 **PERTINENT FACTUAL AND PROCEDURAL BACKGROUND**

14 Plaintiff has a fourth-grade education and was 53 years old on the date of his
 15 administrative hearing. (See Administrative Record ("AR") at 119, 403, 409.) His
 16 prior relevant work includes employment as a janitor. (*Id.* at 25, 431.)

17 Albeit, during the administrative hearing, the Administrative Law Judge
 18 ("ALJ") did note that Plaintiff previously testified that he completed the *sixth* grade.
 19 (See AR at 409.)

20 Plaintiff has filed three sets of applications for Disability Insurance Benefits
 21 ("DIB") and Supplemental Security Income ("SSI") pursuant to Titles II and XVI of
 22 the Social Security Act ("Act"), including the applications at issue herein. (Joint
 23 Stip. at 2); 42 U.S.C. § 405(g).

24 On June 15, 2004, Plaintiff filed his second set of applications for DIB and
 25 SSI on the basis of hypertension, diabetes, seizures, headaches, and memory loss.
 26 (AR at 57.) On November 24, 2006, the ALJ denied Plaintiff's request for benefits
 27 ("2006 Decision"). (*Id.* at 57-76.) On August 4, 2007, the Appeals Council
 28 affirmed the ALJ's decision. (*Id.* at 10.)

1 Following the Appeals Council's denial, Plaintiff filed an action in this Court,
 2 Case No. ED CV 07-6145 JTL, seeking review of the Commissioner's decision
 3 denying his claim. (AR at 10.) On August 18, 2008, the Court affirmed the ALJ's
 4 decision. (*Id.*)

5 On December 31, 2006, Plaintiff filed the current applications for SSI and
 6 DIB, claiming that he has been disabled since April 30, 2001 due to seizures,
 7 diabetes, high blood pressure, fatigue, pain, and high cholesterol.^{1/} (AR at 90, 119-
 8 126, 127-131, 132-134.) Plaintiff's applications were denied initially and on
 9 reconsideration, after which he filed a timely request for a hearing. (*Id.* at 10, 83,
 10 84-88, 89, 90-94.)

11 On May 12, 2009, over two years after he filed his applications, Plaintiff,
 12 represented by counsel, appeared and testified at a hearing before an ALJ. (AR at
 13 403, 405-431.) The ALJ also heard testimony from Alan E. Cummings, a vocational
 14 expert ("VE"). (*Id.* at 106, 403, 431-434.) On June 17, 2009, the ALJ issued an
 15 unfavorable decision denying Plaintiff's request for benefits. (*Id.* at 10-30.)

16 Applying a well-established five-step sequential evaluation process, the ALJ
 17 found, at step one, that Plaintiff has not engaged in substantial gainful activity since
 18 his alleged onset date of disability. (AR at 27.)

19 At step two, the ALJ found that Plaintiff suffers from severe impairments
 20 consisting of "seizure disorder, history of right hand injury, early degenerative
 21 changes in the right knee, diabetes mellitus, hypertension and obesity." (AR at 27
 22 (emphasis omitted).)

23 At step three, the ALJ determined that the evidence does not demonstrate that
 24 Plaintiff's impairments, either individually or in combination, meet or medically

25
 26 ^{1/} Plaintiff's SSI application lists a filing date of January 10, 2007 and his DIB
 27 application lists a filing date of December 20, 2006. (*See* AR at 119-126, 132-134.)
 28 However, both parties and the ALJ refer to the current applications as filed on
 December 31, 2006. (*See* Joint Stip. at 2; AR at 10.)

1 equal the severity of any listing set forth in the Social Security regulations.^{2/} (AR at
2 27.)

3 The ALJ then assessed Plaintiff's residual functional capacity ("RFC")^{3/} and
4 determined that he can perform light work, specifically, the ALJ found that Plaintiff
5 can:

6 lift and carry up to 10 pounds frequently and 20 pounds
7 occasionally, stand and/or walk 6/8 hours, sit 6/8 hours, push/pull
8 frequently with the right upper extremity and push/pull
9 occasionally with the right lower extremity, [handle] occasional
10 walking on uneven terrain, otherwise normal push/pull with the
11 bilateral upper extremities and bilateral lower extremities,
12 occasional climbing, balancing, stooping, kneeling, crouching
13 and crawling, frequent handling and fingering with the right
14 upper extremity[.]

15 (AR at 27 (emphasis omitted).)

16 The ALJ also found that Plaintiff's "bilateral upper extremities have normal
17 reaching, handling, fingering and feeling[, but he should] avoid even moderate
18 exposure to extreme heat and cold, unprotected heights and hazardous machinery."
19 (AR at 27 (emphasis omitted).)

20 Based on Plaintiff's RFC, the ALJ found, at step four, that Plaintiff lacks the
21 ability to perform his past relevant work. (AR at 29.)

22
23 ^{2/} See 20 C.F.R. pt. 404, subpt. P, app. 1.
24

25 ^{3/} Residual functional capacity is what a claimant can still do despite existing
26 exertional and nonexertional limitations. *Cooper v. Sullivan*, 880 F.2d 1152, 1155
27 n. 5 (9th Cir. 1989). "Between steps three and four of the five-step evaluation, the
28 ALJ must proceed to an intermediate step in which the ALJ assesses the claimant's
residual functional capacity." *Massachi v. Astrue*, 486 F.3d 1149, 1151 n. 2 (9th
Cir. 2007).

1 At step five, based on Plaintiff's age, education, work experience, RFC, and
2 the VE's testimony, the ALJ found that "there are jobs that exist in significant
3 numbers in the national economy that [Plaintiff] can perform," including *packager*
4 and *inspector*. (AR at 29-30 (emphasis omitted).)

5 Thus, the ALJ concluded that Plaintiff was not suffering from a disability as
6 defined by the Act because he could adjust to his impairments and find another type
7 of gainful employment. (AR at 30.)

8 Plaintiff filed a timely request for review of the ALJ's decision, which was
9 denied by the Appeals Council. (AR at 3-5, 6.) The ALJ's decision stands as the
10 final decision of the Commissioner.

III.

ISSUE PRESENTED

13 A single disputed issue is presented here: whether the ALJ's finding that
14 Plaintiff is "able to speak and understand 'at least a simple' conversation in English"
15 conflicts with her finding that Plaintiff is able to perform the jobs of packager and
16 inspector. (*See* Joint Stip. at 4-11, 15-16.)

17 Plaintiff contends that because the jobs of packager and inspector necessitate,
18 according to the Dictionary of Occupational Titles, a “language development level
19 two,” which denotes, among other things, that the individual retains a passive
20 vocabulary of 5,000 to 6,000 words and reads at a rate of 190-215 words per minute,
21 the ALJ’s finding conflicts with Plaintiff’s actual English language skills. (Joint
22 Stip. at 4.)

IV.

DISCUSSION AND ANALYSIS

25 The arguments are straightforward. On the one hand, Plaintiff contends that
26 the ALJ's finding regarding Plaintiff's language skills is inconsistent with her
27 determination that Plaintiff can perform the jobs of packager and inspector. The
28 jobs identified by the ALJ require a greater language skill level, as defined by the

1 Dictionary of Occupational Titles, than that possessed by Plaintiff. (See Joint Stip.
2 at 4-9.) Plaintiff further alleges that the ALJ failed to address this inconsistency, as
3 she must, during her questioning of the VE or explain the conflict in her decision.
4 (See *id.* at 9-11.)

5 On the other hand, Defendant argues that Plaintiff's claim is barred by
6 administrative *res judicata*. Specifically, Plaintiff fails to demonstrate "changed
7 circumstances" sufficient to deviate from a prior decision determining nondisability,
8 including the earlier finding that Plaintiff could function as a packager and inspector
9 – the same job classifications cited here. (Joint Stip. at 11-13.) Defendant also
10 maintains that, in any event, substantial evidence supports the ALJ's determination
11 regarding Plaintiff's language ability to perform the jobs identified. (*Id.* at 13-15.)

12 The Court concurs with Defendant.

13 A. Absent Changed Circumstances, a Prior Decision's Findings Must
14 Stand

15 "The principles of *res judicata* apply to administrative decisions, although the
16 doctrine is applied less rigidly to administrative proceedings than to judicial
17 proceedings." *Chavez v. Bowen*, 844 F.2d 691, 693 (9th Cir. 1988). Administrative
18 *res judicata* "applies generally in Social Security cases [and] can be invoked both by
19 a claimant and by the Social Security Administration." *Bloch on Social Security*
20 § 5:18 (2008).

21 Thus, *res judicata* applies if the Commissioner has "made a previous
22 determination or decision . . . about [a claimant's] rights on the same facts and on the
23 same issue or issues, and this previous determination or decision has become final
24 by either administrative or judicial action." 20 C.F.R. §§ 404.957(c)(1) &
25 416.1457(c)(1).

26 A previous final determination of nondisability creates a presumption of
27 continuing nondisability with respect to any subsequent unadjudicated period of
28 alleged disability. *See Lester v. Chater*, 81 F.3d 821, 827 (9th Cir. 1996); *see also*

1 *Miller v. Heckler*, 770 F.2d 845, 848 (9th Cir. 1985); *Lyle v. Secretary of Health and*
 2 *Human Services*, 700 F.2d 566, 568-69 (9th Cir. 1983); Social Security
 3 Acquiescence Ruling (“SSAR”)⁴ 97-4(9), 1997 WL 742758.

4 This presumption may be overcome by a showing of “changed
 5 circumstances.” *Chavez*, 844 F.2d at 693; *Taylor v. Heckler*, 765 F.2d 872, 875 (9th
 6 Cir. 1985). To show “changed circumstances,” the evidence must establish that the
 7 claimant suffers from an impairment that indicates a greater disability since the prior
 8 decision denying benefits. *Chavez*, 844 F.2d at 693.

9 In other words, the presumption of nondisability does not apply if the claimant
 10 raises an issue not considered in the previous decision, such as the existence of a
 11 new impairment, or demonstrates an increase in the severity of an impairment, either
 12 one of which adversely affects his residual functional capacity. *See Lester*, 81 F.3d
 13 at 827.

14 The presumption does *apply*, however, “where the final decision by the ALJ
 15 on the prior claim, which found the claimant not disabled, contained findings of the
 16 claimant’s residual functional capacity, *education*, and work experience.” SSAR 97-
 17 4(9), 1997 WL 742758, at *2 (emphasis added). In that event, the Social Security
 18 Administration “may not make different findings in adjudicating the subsequent
 19 disability claim unless there is new and material evidence relating to the claimant’s
 20 residual functional capacity, education or work experience.” *Id.*

21

22 **B. Plaintiff Fails to Demonstrate Any Changed Circumstance**

23 Here, the ALJ found that the circumstances had not materially changed since

25 ⁴ The Commissioner issues SSARs when a “United States Court of Appeals[.]”
 26 holding conflicts with [the Commissioner’s] interpretation of a provision of the . . .
 27 Act or regulations[.]” 20 C.F.R. § 416.1485(b). SSARs are “binding on all
 28 components of the Social Security Administration[.]” *Id.* at § 402.35(b)(2); *accord*
Pinto v. Massanari, 249 F.3d 840, 844 n. 3 (9th Cir. 2001).

1 the date of the prior decision. (See AR at 11, 13, 14.) Plaintiff cannot contest this
2 finding or otherwise meaningful demonstrate why *res judicata* principles should not
3 bar his current claim. (See generally Joint Stip. at 2-11, 16.) At least three reasons
4 compel this conclusion.

5 First, there is an admission of “no evidence” to reflect a “changed
6 circumstance” on Plaintiff’s ability to speak English *as previously determined*. At
7 the administrative hearing, Plaintiff’s counsel acknowledged that he had “NO
8 evidence to overturn the two prior [ALJ] decisions issued on the prior claims filed
9 by [Plaintiff], including the last final [ALJ] decision issued on November 24, 2008,
10 that was affirmed by the District Court.” (AR at 11.) Plaintiff’s counsel stated that
11 he “would be interested . . . in talking about new mental limitations which developed
12 in 12/06,” *but* submitted no new evidence apart from Plaintiff’s testimony on those
13 limitations. (*Id.* at 408.) Thus, Plaintiff, himself, opted to close the door on
14 revisiting his education, including his English language capabilities. 20 C.F.R. §
15 404.988 (allowing for reopening prior determinations for good cause).

16 Second, Plaintiff’s effort to wedge an incongruity here – based on the ALJ’s
17 “vague” findings – is also illusory. Plaintiff myopically focuses on the ALJ’s
18 conclusion that Plaintiff is “able to speak and understand ‘at least a simple’
19 conversation in English.” (See Joint Stip. at 4.) The *fuller* finding, however, is that
20 the ALJ explicitly found “no basis to reopen the previous determinations on
21 [Plaintiff’s] prior applications,” including, naturally, the findings on his educational
22 level to function as a packager or inspector. (AR at 13.) This rationale is lent
23 additional heft when the ALJ also noted that Plaintiff consistently changes his
24 reports on how much education he has. (See *id.* at 13, 28, 409-410.) Like Plaintiff,
25 the ALJ also kept the door shut on Plaintiff’s education.

26 Third, while Plaintiff argues that *res judicata* does not apply to his claim
27 because “the ability to communicate English is not part of the sequential process but
28 rather a vocational factor to be considered,” (see Joint Stip. at 16), the Court is

1 unable to locate any authority for such a carve-out proposition, and Plaintiff does not
 2 cite to any. (*See generally id.* at 1-17.) In fact, the authority that does exist strongly
 3 suggests that the scope of administrative *res judicata* and the related doctrine of
 4 collateral estoppel prevent, at a minimum, the re-litigation of Plaintiff's *education*
 5 under the circumstances presented here. *Chavez*, 844 F.2d at 694 ("Principles of *res*
 6 *judicata* made binding the first judge's determinations that the claimant . . . was of
 7 limited education[.]"); *see also Clark v. Astrue*, 2009 WL 2579486, at *2-*3 (C.D.
 8 Cal. 2009) (where plaintiff alleges same basis for medical disability that was
 9 previously alleged in his prior two claims for disability, presumption of continuing
 10 nondisability ordinarily applies).

11 In the end, it has already been judicially found once that Plaintiff can perform
 12 the jobs of packager and inspector. This was *originally* made by the ALJ in the 2006
 13 Decision. (*See* AR at 75 (finding Plaintiff capable of performing jobs of "inspector,
 14 hand packager").) That decision was then, in turn, affirmed by this Court in 2008.
 15 (*See id.* at 80-82.) Plaintiff failed to meet his burden to rebut this presumption.
 16 Speculation cannot now substitute for "changed circumstances." *See Ellison v.*
 17 *Astrue*, 2008 WL 4425764, at *3 (C.D. Cal. 2008) (finding that plaintiff did not
 18 rebut the presumption of continuing nondisability where plaintiff presented no facts
 19 of changed circumstances, and instead, simply attacks ALJ's finding that plaintiff
 20 could perform jobs of sales clerk and account clerk).^{5/}

21

22 ^{5/} Although Defendant also argues that the ALJ's decision with respect to
 23 Plaintiff's language skills is supported by substantial evidence, (Joint Stip. at 13-15),
 24 the Court need not reach that issue at this time because it is clear that Plaintiff's
 25 claim is barred by administrative *res judicata*. In any event, assuming, without
 26 deciding, that the ALJ erred, the Court notes that Plaintiff's prior employment as a
 27 janitor required language level two ability. *See Dictionary of Occupational Titles*
 28 381.687-018, 1991 WL 673258 (occupation of janitor requires language level two,
 which includes passive vocabulary of 5,000-6,000 words and reading rate of 190-
 215 words per minute).

1 Based on the foregoing, IT IS ORDERED THAT judgment shall be entered
2 **AFFIRMING** the decision of the Commissioner denying benefits.

4 || Dated: September 20, 2010

Hon. Jay C. Gandhi
United States Magistrate Judge